Supreme Court, U.S.
FILED

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NO. ___ OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

CRUZ A. GOMEZ,

Petitioner

v.

TEXAS COURT OF CRIMINAL APPEALS

Respondent

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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PETITION FOR WRIT OF CERTIORARI

JAMES R. BUTLER
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Houston, Texas 77002
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Attorney for Petitioner

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QUESTION PRESENTED

Whether the Due Process Clause requires a judge to inform counsel of potential jury misconduct before dismissing the jury.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of the case before this Honorable Court.

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APPENDIX

Appendix A -- Opinion of the First Court of Appeals, Houston, Harris County, Texas, filed on February 4, 1999

Appendix B -- Petitioner's Motion for New Trial

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OPINIONS BELOW

The opinion of the Texas Court of Appeals for the First Judicial District is partially reported at *Gomez v. State*, 991 S.W.2d 870 (Tex.App.--Houston[1st Dist] 1999, pet. ref'd.).

STATEMENT OF JURISDICTION

The judgment of the Texas Court of Appeals for the First Judicial District was entered on February 5, 1999. A petition for discretionary review was timely filed with the Texas Court of Criminal Appeals. This petition was denied on September 8, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part "... nor shall any State deprive any person of life, liberty, or property, without due process of law ... ."

STATEMENT OF THE CASE

The fundamental question in the case is whether a judge is required by the Due Process Clause to inform counsel of potential jury misconduct before dismissing the jury so that counsel can preserve error on appeal. The facts required to resolve this question in the petitioner's case are short and concise.

The petitioner was charged with manslaughter. During the course of his trial, a court reporter overheard a conversation in which two people were discussing a particular case. This conversation took place on an elevator at the courthouse. The reporter noted the number of the district court on the juror badges that the two people were wearing. The court reporter then went to that court and informed the judge about what she had observed. Upon being informed, the judge did not tell either counsel about this potential misconduct.

After the jury rendered its sentence and was dismissed, the judge informed counsel for the petitioner about the potential misconduct. Counsel filed a motion for new trial based on the fact that the petitioner had been denied his right to a fair trial because of: (1) the jury misconduct itself; (2) he had been denied the opportunity to move for a mistrial; and (3) he had been denied the opportunity to develop the record for review. The court denied the motion for new trial. On appeal, counsel raised the same issues. The Texas Court of Appeals for the First Supreme Judicial District held that the trial judge had not committed an error.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS REGARDING A JUDGE'S ROLE AT TRIAL TO PROTECT A PARTY'S ESSENTIAL DUE PROCESS RIGHT TO A FAIR TRIAL.

The petition for certiorari should be granted because the opinion below conflicts with this Court's prior rulings regarding a judge's role at trial to protect a party's essential due process right to a fair trial. In delineating the contours of this essential right, the Court has consistently required that the proceedings be impartial. *Jordan v. Commonwealth of Massachusetts*, 225 U.S. 167, 176 (1912). In ascertaining the role the judge plays in assuring this right, the Court has held that "[t]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct... ." *Herron v. Southern Pacific Co.*, 283 U.S. 91, 95 (1927); *Quercia v. United States*, 289 U.S. 466, 470 (1933). Courts below have interpreted *Quercia* to require the judge to facilitate the orderly progress of the trial. *United States v. Davis*, 752 F.2d 963, 974 (5th Cir. 1985); *United States v. Samak*, 7 F.3d 1196 (5th Cir. 1993).

In the petitioner's case, the judge violated the mandate of *Jordan* and showed partiality because she prejudiced the petitioner's right to preserve error by failing to inform anyone of the problem until after the jury was dismissed. The judge also violated the mandate of *Quercia* by failing to assure the proper conduct of the trial. Since the Texas Court of Appeals for the First Supreme Judicial District issued an opinion that upheld this

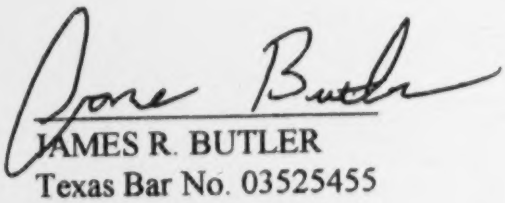
activity, then it conflicts with the opinions of this Court, and the petition for writ of certiorari should be granted.

In researching this issue, counsel for petitioner found very few cases that addressed this issue. Counsel attributes this lack of prior decisions to the fact that many judges understand the essential right to a fair trial. *See Alba v. State*, 905 S.W.2d 581 (Tex.Crim.App. 1993); *Robinson v. State*, 851 S.W.2d 216 (Tex.Crim.App. 1991). In both of the cited cases, the issue was not raised on appeal because the courts allowed the record to be developed before dismissing the jury. In the few cases where a hearing was not held, the courts found it to constitute error. *United States v. Denman*, 100 F.3d 399, 405 (5th Cir. 1996); *United States v. Betner*, 489 F.2d 1196 (5th Cir. 1974); *Commonwealth v. DeJesus*, 44 Mass. App. Ct. 349, 691 N.E.2d 234 (1998); *Commonwealth v. Donovan*, 15 Mass. App. Ct. 269; 444 N.E.2d 965 (1983).

CONCLUSION

This case presents a question of exceptional importance -- whether a judge has a duty to inform counsel of potential juror misconduct before dismissing the jury. By granting this petition for certiorari, this Court can define the extent of the responsibility the judge has to protect a party's essential due process rights.

Respectfully submitted,



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APPENDIX A
Opinion on Overruling of Motion for Rehearing
Issued February 4, 1999

In the

Court of Appeals
For The
First District of Texas

NO. 01-96-01119-CR

CRUZ ARMONDO GOMEZ, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 717,596

OPINION ON MOTION FOR REHEARING

We overrule appellant's motion rehearing, partially grant appellant's motion to publish, withdraw our opinion issued

October 22, 1998, and substitute this opinion in its stead. We vacate, set aside, and annul our judgment of October 22, 1998.

A jury found appellant, Crus Armondo Gomez, guilty of manslaughter and assessed punishment at two years confinement. We affirm.

In his first point of error, appellant asserts the trial court erred in denying his motion for a new trial due to jury misconduct, and subsequent judicial error. In his second point of error, appellant asserts he was denied his right to a fair trial, in violation of the United States and Texas constitutions, by the misconduct of the jury and the material judicial error that followed.

A new trial shall be granted an accused when the court finds the jury has engaged in such misconduct that the accused has not received a fair and impartial trial. Tex.R.App. P.21.3(g). A movant for a new trial based on jury misconduct must prove that (1) the misconduct occurred and (2) and the misconduct resulted in harm to the movant. *Garza v. State*, 630 S.W.2d

272, 274 (Tex.Crim.App. 1982). The issue of whether jury misconduct took place is determined by the trial court. *Stowe v. State*, 745 S.W.2d 568, 569 (Tex.App.--Houston [1st Dist.] 1988, no pet.). The finding of the trial court that no jury misconduct occurred is binding on the reviewing court and will be reversed only where a clear abuse of discretion is shown. *Id.*

On September 4, 1996, Sharon Cook, official court reporter for the 263rd District Court, was riding in the elevator located in the Harris County Criminal Courts Building, when she heard two female passengers, who were wearing juror badges from the 232nd District Court-Judge Mary Lou Keel, discussing issues related to a criminal case. She could not remember the exact words of their conversation, but she did recall the two women discussing prior convictions and other matters.[1] The next day, September 5, 1996, Cook informed the 232nd District

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[1] The record shows that the conversation on the elevator took place on the second day of jury deliberations in the present case.

Court about the conversation. Later that day, the jury returned a verdict on appellant's punishment and was released by the court. Judge Keel then informed appellant's counsel that earlier in the day she had been informed by Cook that two jurors had been overheard discussing the case in an elevator.

Appellant filed a motion for new trial alleging jury misconduct. In support of his motion, appellant attacked two affidavits: his trial attorney's and Cook's. Cook's affidavit stated:

> (3.) On September 5, 1996, I was one of several people in the public elevator located in the Harris County Criminal Courts Building located at 301 San Jacinto, Houston, Texas. I clearly heard two (2) of the female passengers discussing issues related to a criminal case. I do not recall the exact words of the two women, but I did hear the women discussing prior convictions and other matters related to a criminal case. I clearly saw that both women were wearing juror badges from the 232nd District Court, Judge Mary Lou keel.
>
> (4.) A short while later that same day, I informed Arlene Webb. Arlene Webb is the Official Court Reporter for the 232nd District Court. When I told Arlene Webb what I had

> heard the two women discussing in the elevator, she said it did sound like the case which was currently in trial in the 232nd District Court - The State of Texas v. Crus Armondo Gomez.

Appellant's trial attorney's affidavit restated the information in Cook's affidavit. Appellant did not support his motion with testimony or affidavits from any of the jurors.

Article 36.22 of the Code of Criminal Procedure states:

> No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court.

Tex.Code Crim.P.Ann. Art. 36.22 (Vernon 1981). The purpose of article 36.22 is to prevent an outsider form saying something that might influence a juror. *Ites v. State*, 923 S.W.2d 675, 677 (Tex.App.--Houston [1st Dist.] 1966, pet. ref'd.). Therefore, when a juror communicates with an *unauthorized person* about the case at trial, there is a presumption that the defendant was injured. *Quinn v. State*, 958 S.W.2d 395, 401 (Tex.Crim.App. 1997). This presumption is rebuttable, and a new trial is not

required unless there has been injury to the accused. *Alba v. State*, 905 S.W.2d 581, 587 (Tex.Crim.App. 1995).

Appellant asserts the jury engaged in misconduct when two jurors discussed, with each other, elements of a case in a public forum. Appellant relies on cases where a jury received outside evidence or where a third party spoke to a juror. Here, the jurors did not discuss evidence with anyone outside the jury nor has it been shown that the jurors discussed inadmissible or outside evidence.

In support of his motion for new trial, appellant relied on the solitary statement from Cook's affidavit stating that she could not remember the exact words of the jurors conversation, but she did recall two jurors discussing "prior convictions and other matters." Neither Cook nor appellant suggested the jurors were speaking to, or were spoken to by, Cook or anyone else in the elevator. There is no evidence that the jurors communicated with an unauthorized person. The facts merely indicate that, after deliberations had begun in the punishment phase, two

jurors discussed the case without all the jurors present. Although we do not condone the jurors' conduct, which contravened explicit instructions from the judge, we can find no case holding that a trial court abused its discretion in denying a motion for new trial when two jurors discussed the case with each other on breaks. *Cf. Baley v. W/W Interests, Inc.*, 754 S.W.2d 313, 316 (Tex.App.--Houston [14th Dist.] 1988, writ denied)(holding that any conversation regarding the case occurring between or among jurors is a part of jury deliberations regardless of the time and place where it occurs, even when on lunch or coffee breaks before the "formal" deliberations have begun); *Wilson v. Texas Parks and Wildlife Dept.*, 853 S.W.2d 825, 831 (Tex.App.--Austin 1993), *rev'd on other grounds*, 886 S.W.2d 259 (Tex. 1994)(holding discussion between two jurors in the men's room did not constitute jury misconduct).

Furthermore, there is no evidence that appellant's substantial rights were affected by the jurors' conversation. In the absence of a showing of harm, there is no reversible error.

Garza, 630 S.W.2d at 274; Tex.R.App.P. 44.2(b).

Appellant further complains that the trial court erred by waiting until after the jury had been dismissed to inform appellant of possible juror misconduct. We agree that a better procedure would have been for the trial judge to promptly inform the State and defense counsel of the possible jury misconduct so that the jurors could have been questioned before the end of trial. *See Robinson v. State*, 851 S.W.2d 266, 229 (Tex.Crim.App. 1991). However, we conclude no reversible error has been shown. Appellant did not call any jurors as live witnesses in the hearing on his motion for new trial nor did he file any juror affidavits. There is no indication in the record that appellant's counsel even talked to any of the jurors after the trial. Appellant has failed to show his substantial rights were affected by the trial court's actions. Tex.R.App.P.44.2(b).

We overrule appellant's first and second points of error.

The discussion of the remaining points of error does not meet the criteria for publication, Tex.R.App.P.47, and is thus

ordered not published.

We affirm the judgment.

In his third point of error, appellant asserts the evidence was both legally and factually insufficient to support the manslaughter conviction. We review the evidence in accordance with the standards for legal sufficiency review. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex.Crim.App. 1997), and factual sufficiency review, *Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App. 1996).

Appellant, a 74-year-old Hispanic male, had been living at 10303 Envoy for 40 years. In response to the deterioration of his neighborhood, appellant placed bars on all his windows and a metal fence around his yard. He also attended a police seminar where he and others were told to get involved in their community. They were instructed to call the police if they ever suspected criminal activity, and to document criminal activity with a camera.

The neighbors that appellant suspected most of criminal activity, and of whom he mad a regular practice of taking pictures, were Martin Mameaux and Gilbert Noel. Because of his suspicion of Mameaux and Noel, and his persistence in taking pictures, tensions ran high among appellant, Noel, and the persons who congregated at Mameaux's house.[2]

On June 27, 1995, appellant was leaving his home with his cell phone and camera. As he walked down his driveway to unlock his metal gate,[3] appellant noticed a group consisting of Mameaux, Leroy King Jr., and two others, outside of Mameaux's house. Appellant began to take pictures of them. King walked out into the street and told appellant, "if he wanted to take pictures of something he could take a picture of this,"

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[2] Mameaux, at the time of the incident, lived at 10310 Envoy, which is across the street from appellant and two doors down on the left. Noel lived at 10229 Envoy, which is just to the right of the appellant's house.

[3] This is about the last thing anyone in this case agrees on.

grabbing himself in the process. King and appellant then began to yell and cuss at one another. Noel and his wife drove by and saw the argument between King and appellant. After the argument with King, appellant went back inside his home, where his son, a police officer, was sleeping.[4]

Appellant soon realized that he had retreated into his home without first closing his gate, so he took his 9 mm semi-automatic Glock pistol and went back down the driveway to close and lock the gate. Appellant testified that when he reached the end of his driveway to close the gate, the group in front of Mameaux's house began to cuss at him. Appellant became frightened, and he dropped his gun.[5] According to

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[4] The pictures from appellant's camera show that during the first argument only King went into the street to argue and fuss with appellant. Nevertheless, appellant testified he was chased into his house by the entire group. Appellant never went to wake his son and tell him he was having a problem with his neighbors.

[5] Mameaux testified King was taunting appellant when he came back out to close his gate.

appellant, Noel and his wife began to walk toward appellant's home from the right,[6] and Mameaux and his group, including King, began to approach appellant from the left. Appellant began to have a shouting match with Noel and his wife. Appellant then turned to the group approaching from Mameaux's house and told them, "Come on, I've had all I can take." Appellant then momentarily turned back to the approaching Noels, and then spun back toward Mameaux's group and began to shoot.[7]

– Gregory Cross, who was visiting a family member next

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[6] Having seen the initial confrontation between King and appellant, the Noels' approached appellant to argue on behalf of Mameaux and his friends.

[7] The testimony differs as to whether or not King and the others actually ran toward appellant. Appellant testified that he was rushed and that he saw a gun. Appellant's neighbor, Tony Taylor, without watched the entire scene from the side of his yard, initially told the police that King and the others approached appellant, but changed his testimony to "rushed the appellant" at trial. Mameaux testified that they were walking and did not run. Tony Taylor further testified that appellant could have retreated back into his home on three separate occasions.

door to appellant at the time of the shooting, testified he heard three or four initial shots. These initial shots caused him to go to the window. He saw men running away from appellant's house. Cross heard a second volley fired toward King and the others, and it was during this second volley that King was struck in the back of the head. Cross stated, "There was a distinct pause between the two series of shots."[8]

After appellant fired seven shots at King and the others, he turned toward Noel and his wife and fired four additional shots.

The law provides, and the jury was charged, that a person commits the offense of manslaughter if he recklessly causes the death of an individual. Tex.PenalCodeAnn. §19.04(a)(Vernon 1994). A person acts recklessly with respect

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[8] Appellant testified that he fired continuously as he ran up the driveway in fear for his life; police testified that the first seven shell casings were arranged in a random fashion, but that the last four were in a position that indicated steady shooting from one location.

to the result of his conduct when he is aware of, but consciously disregards, a substantial and unjustifiable risk that the result will occur. Tex.PenalCodeAnn. §603(c)(Vernon 1994). The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the defendant's standpoint. *Id.*

The jury was also charged on the law of self defense. A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against another's use or attempted use of force. Tex.PenalCodeAnn. §9.31(a)(Vernon 1994). The use of force is not justified in response to verbal provocation alone. Tex.PenalCodeAnn. §9.31(b)(Vernon Supp. 1998). If the defendant provoked another's use of or attempted use of unlawful force, the defendant's use of force is not justified unless the defendant abandons the encounter or clearly communicates his intent to do so and the other person nevertheless continues

or attempts to use unlawful force against the defendant. *Id.* To be justified in using *deadly* force in self defense, the evidence must show a reasonable person in the defendant's situation would not have retreated. Tex.PenalCodeAnn. §9.32(a)(2)(Vernon Supp. 1998).

The State is not required to affirmatively produce evidence to refute a self-defense claim, but must prove its case beyond a reasonable doubt. *Saxton v. State*, 804 S.W.2d 910, 912 (Tex.Crim.App. 1991). The issue of self defense is an issue of fact to be determined by the jury and the jury is free to accept or reject the appellant's evidence. *Id.* at 913-14. A verdict of guilty is an implicit finding rejecting the defendant's self defense theory. *Id.* at 914.

Appellant argues that he acted in self defense. Although there is evidence that King told appellant, "I am going to blow you away," verbal provocation alone does not entitle appellant to use deadly force to defend himself. Tex.PenalCodeAnn. §9.31(b)(1)(Vernon Supp. 1998). The evidence is conflicting

about King's actions toward appellant. Several witnesses testified appellant was taunting the men to come closer to his house "if they were bad." A trace metal test proved negative for weapons on King's body, and no weapon was found. There was evidence that appellant could have retreated into his home on three separate occasions, where his son, a police officer, was sleeping. There was evidence that King was shot as he was running or walking away.

Appellant argues the "State produced two convicted felons," "a common law wife of one of the felons," and "Mr. King himself was a convicted felon," suggesting that this court can make a finding of factual insufficiency based on witness credibility. However, this court must defer to the jury's determination of witness credibility when reviewing factual sufficiency. *Cain v. State*, 958 S.W.2d 404, 408 (Tex.Crim.App. 1997).

The evidence is legally and factually sufficient to support the conviction. Accordingly, we overrule point of error three.

We affirm the judgment.

Margaret Garner Mirabal
Justice

Panel consists of Justices Mirabal, Wilson, and Taft.
Public in part; do not publish. Tex.R.App.P.47.

APPENDIX B
Motion for New Trial
Filed October 2, 1996

No. 717,596

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	OF HARRIS COUNTY, TX
CRUZ ARMONDO GOMEZ	§	232ND JUDICIAL DISTRICT

MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **Cruz Armondo Gomez**, Defendant in the above styled and numbered cause, by and through his attorney, and files this Motion for New Trial, and would show this Honorable Court as follows:

I.

On September 4, 1996, the Defendant was found guilty by a jury of the offense of manslaughter. On September 6, 1996, the jury sentenced the Defendant to two (2) years confinement in the Texas Department of Corrections.

II.

Pursuant to the Texas Rules of Appellate Procedure, Rule 30(b)(2) and (8), the Defendant is entitled to a new trial due to the misconduct of the jury, which denied the Defendant his right to a fair and impartial trial.

Specifically, during the second (2nd) day of deliberation on the issue of punishment, (September 5, 1996), two (2) of the jurors violated the order of the Court by deliberately discussing issues of punishment and the facts of the case in a public elevator. This jury misconduct was witnessed by Ms. Sharon Cook, who is the official court reporter for the 263rd District Court of Harris County, Texas. (See attached affidavit of Sharon Cook).

Ms. Cook reported the jury misconduct to Ms. Arlene Webb, the Official Court Reporter for the 232nd District Court, on Thursday, September 5, 1996.

Ms. Cook then reported the jury misconduct to the Court on Friday, September 6, 1996 - before the jury had

reached a verdict on punishment. However, counsel for defendant was not informed by the Court of the jury misconduct until after the jury returned a verdict of punishment and was dismissed from service. Therefore, counsel for Defendant was not afforded the opportunity to move for a mistrial and thereby preserve the record. Moreover, because the disclosure was made after-the-fact, the Court did not use its timely opportunity to question the jurors regarding the jury misconduct prior to the verdict. Therefore, the Court cannot now assume in hindsight that the misconduct was harmless and would not have affected the jury's verdict.

The jury misconduct is amplified in light of the fact that the jury sent out two (2) notes during the punishment deliberation. One jury note asked the Court if the Defendant would automatically receive probation if the jury could not reach a unanimous decision. The other note informed the Court that the jury could not reach a unanimous decision. At this point, the Court overruled Defendant's motion for a mistrial. The jury then

received an Allen Charge from the Court. At approximately 4:00 p.m. on Friday, September 6, 1996, the jury returned a verdict on punishment.

The subject of the jury misconduct is the issue of punishment. This is the very subject upon which the jury was still unable to reach a unanimous verdict when the Court became aware of the jury misconduct. Yet, the Court overruled Defendant's motion for mistrial and failed to inform counsel of the jury misconduct until after the verdict was rendered and the jury was released.

Based upon (i) the Court's overruling of the Defendant's motion for a mistrial after the jury's note of dead-lock; (ii) the jury misconduct; and (iii) the failure of the Court to inform counsel for Defendant of the jury misconduct until after the verdict was rendered and the jury was released, the Defendant did not receive a fair and impartial trial.

III.

Defendant further shows that he is entitled to a new trial pursuant to the Texas Rules of Appellate Procedure, Rule 30(b)(9).

Specifically, the evidence is insufficient to support a verdict of guilty on the charge of manslaughter. The Defendant presented sufficient evidence to warrant a finding of self defense. The Defendant was charged with "recklessly causing the death of Leroy King, Jr." The Defendant was not charged with "recklessly" shooting at other people in the area. The Defendant's charge concerned only Leroy King, Jr.

The aggressive and threatening actions of Leroy King, Jr. toward the Defendant were undisputed by the evidence. As concerns only Leroy King, Jr., the Defendant was justified in his action of self defense. The jury clearly and improperly considered the actions of the Defendant after Leroy King, Jr., was shot, i.e., Gilbert Noel, Elizabeth Roy and the bullet in the car. Focusing only on Leroy King, Jr., the evidence establishes

and justifies the actions of the Defendant in protecting his life.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court hold a hearing incident to this motion and after hearing evidence incident thereto grant the Defendant a new trial.

Respectfully submitted,

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Facsimile: (713) 228-0034

ATTORNEY FOR DEFENDANT
CRUZ ARMONDO GOMEZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion for New Trial has been delivered to the Assistant District Attorney handling this cause for the 232nd Judicial District Court of Harris County, Texas, on this the _____ day of October, 1996.

_____

JAMES R. BUTLER

THE STATE OF TEXAS §
COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared **Sharon Cook**, and after being duly sworn by me, upon oath stated the following:

> "(1.) My name is Sharon Cook. I am over the age of twenty-one (21) years. I make this sworn statement freely and voluntarily.
>
> (2.) I am employed as the Official Court Reporter for the 263rd District Court of Harris County, Texas.
>
> (3.) On September 5, 1996, I was one of several people in the public elevator located in the Harris County Criminal Court Building located at 301 San Jacinto, Houston, Texas. I clearly heard two (2) of the female passengers discussing issues related to a criminal case. I do not recall the exact words of the two women, but I did hear the women discussing prior convictions and other matters related to a criminal case. I clearly saw that both women were wearing juror badges from the 232nd District Court, Judge Mary Lou Keel.

(4.) A short while later that same day, I informed Arlene Webb. Arlene Webb is the Official Court Reporter for the 232nd District Court. When I told Arlene Webb what I had heard the two women discussing in the elevator, she said it did sound like the case which was currently in trial in the 232nd District Court - The State of Texas v. Cruz Armondo Gomez.

(5.) The following day, September 6, 1996, I informed the 232nd District Court of what I heard the two (2) female jurors discussing in the elevator. To my knowledge, the trial was still in progress at the time I informed the Court of the two (2) female jurors.

Executed on this the 2nd day of October, 1996.

_____

SHARON COOK

SWORN AND SUBSCRIBED TO BEFORE ME on this 2nd day of October, 1996.

_____

NOTARY PUBLIC, STATE OF TEXAS

No. 717,596

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	OF HARRIS COUNTY, TX
CRUZ ARMONDO GOMEZ	§	232ND JUDICIAL DISTRICT

ORDER SETTING HEARING DATE

IT IS ORDERED, that the hearing on the Motion for New Trial is hereby set on the _____ day of _____, 1996, at _____ a.m./p.m.

SIGNED this ____ day of _____, 1996.

_____
JUDGE PRESIDING

No. 717,596

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
VS.	§	OF HARRIS COUNTY, TX
CRUZ ARMONDO GOMEZ	§	232ND JUDICIAL DISTRICT

ORDER FOR NEW TRIAL

Came on to be heard this date, Defendant's Motion for New Trial, and the Court, having considered same, is of the opinion that said motion is hereby: GRANTED.

IT IS THEREFORE ORDERED that a new trial be conducted in the above-entitled and numbered cause.

SIGNED this ____ day of _____, 1996.

_____

JUDGE PRESIDING

APPENDIX C
Excerpts from Petitioner's Appellate Brief
Filed December 23, 1997

APPELLANT'S FIRST POINT OF ERROR

THE TRIAL COURT ERRED IN THE DENIAL OF APPELLANT'S MOTION FOR NEW TRIAL DUE TO THE JURY MISCONDUCT AND THE SUBSEQUENT JUDICIAL ERROR WHICH WAS CALCULATED TO INJURE THE RIGHTS OF THE APPELLANT.

The appellant is entitled to a new trial pursuant to Texas Rule of Appellate Procedure 30(b)(2) and (7) which provide that a new trial shall be granted (i) where after retiring to deliberate, a juror has conversed with any other person in regard to the case; or (ii) where the court has committed a material error calculated to injure the rights of the accused.

A motion for new trial alleging jury misconduct must be supported by the affidavit of a juror or some other person who was in a position to know facts. *Reed v. State of Texas*, 841

S.W.2d 55 (Ct.App.--El Paso, 1992). The affidavit must state facts and not mere suspicions. *Id.* In determining whether to grant a new trial on grounds of jury misconduct, the effect of "other evidence" on the jury or the question of injury to the Appellant is not a consideration. *Id.* To be granted a new trial on grounds of jury misconduct after retiring to deliberate, it is not necessary to speculate on the probable effect upon the jury or to make a demonstration that one or more jurors were persuaded to vote one way or another because of the improper conduct. *Id.* Texas Rules of Appellate Procedure, Rule 30(b)(7). This line of case law is reasonable and logical in light of the fact that "injury to the accused is presumed." *Robinson v. State of Texas*, 851 S.W.2d 216 (Tex.Cr.App. 1991). For an accused to have a fair trial, the jury must decide the case only on the basis of the evidence presented at trial. *Id.* Comments made to a juror(s) that could be detrimental to the defendant may require a new trial or reversal. *Baker v. Gladden*, 385 U.S. 363 (1966).

Allegations of jury misconduct are generally addressed by the trial court in one of two situations: (i) while the trial is still in progress, if the court is placed on notice prior to the verdict; and (ii) in a hearing on a motion for new trial, if the court is not placed on notice of the jury misconduct until after the conclusion of the trial. In either situation, the State may attempt to rebut the presumption of harm. *Thomas v. State of Texas*, 699 S.W.2d 845 (Tex.Cr.App. 1985). In the case at bar, the court was placed on notice of jury misconduct during jury deliberation and prior to the verdict of punishment. (1 R. 123 & 126). Therefore, the argument and authorities to follow will address only the situation and remedy when the court is placed on notice of jury misconduct prior to the verdict.

Given the uncertainties surrounding the nature of out-of-court statements and conversations during jury deliberation, the appropriate judicial remedy is an inquiry to determine the juror(s) intent when making the statement(s). *Quinn v. State of Texas* (Tex.Cr.App., Slip Opinion, pp. 1691-96, 12/3/97). [*See*

Robinson v. State of Texas, 851 S.W.2d 216 (Tex.Cr.App. 1991)]. When the court is placed on notice of alleged jury misconduct while the trial is still in progress, the court should properly inform the State and defense counsel, and then question each suspected juror under oath, individually, and out of the presence of others. *See Robinson, supra*. This proper course of action allows (i) the trial judge the opportunity to determine the credibility and demeanor of the suspected juror(s) (*See Quinn, supra*); (ii) the defense the opportunity to investigate the alleged misconduct (*See Robinson, supra*); and (iii) the State the opportunity to rebut the presumption of harm (*See Thomas, supra*). All of which are paramount in the quest for a fair trial.

The Texas Court of Criminal Appeals has made matters incredibly simple for a trial judge to remedy an allegation of jury misconduct during a trial. The trial judge only needs to inform the attorneys and then question the suspected jurors; as the trial judge properly did in *Robinson*. The judge is then free to believe one juror's testimony as to the absence of improper

conduct and to disbelieve and reject all or part of the testimony of the other jurors. *McCartney v. State of Texas*, 542 S.W.2d 156 (Tex.Crim.App. 1976). In *Stephenson*, the Court authorized the use of a harm analysis and recognized that "effective corrective action could remove the taint of such conduct during deliberations, similar to the corrective action of an instruction to disregard evidence improperly heard during trial." *Stephenson v. State of Texas*, 571 S.W.2d at 176 (Tex.Crim.App. 1974). The net result under *Stephenson* is that any such improper statements or conversation is not actually received by the jury unless it was discussed and considered by the jury. *Id.* Of course, this simple remedy presupposes that the trial judge will act properly and take the "corrective action." All that is required is for the trial judge to simply ask. The net result for the Appellant is that the judge did not inform the attorneys, did not question the jurors, did not employ the proper remedial measures and thereby committed a material error. The end result for the Appellant is clear. Because of the trial court's

error, we will never know if corrective action could have removed the taint of misconduct.

In the case at bar, the facts are undisputed and the record is quite clear. During deliberations, at least two (2) jurors disobeyed the continuous order of the court and openly discussed elements and facts of the case in a public forum outside of the court. (1 R. 123 & 126). The jury misconduct was personally witnessed and heard by Ms. Sharon Cook, the official court reported for the 263rd Criminal District Court of Harris County, Texas. (1 R. 123 & 126). The Appellant could not have a more credible and reliable witness. As an official court reporter in a criminal district court, Ms. Cook's knowledge of criminal trial procedure would virtually place her in the role of an expert witness. At the very least, Ms. Cook's knowledge and experience place her in a far better position to recognize improper jury conduct than that of an average citizen. Ms. Cook knew the conduct was wrong and improper, and she immediately reported the conduct while the trial was still in

progress. (1 R. 123 & 126).

Ms. Cook first reported the jury misconduct to Ms. Arlene Webb, the official court reporter for the 232nd Criminal District Court. (1 R. 123 & 126). This was the second day of jury deliberation on punishment, September 4, 1996. Ms. Webb did not inform Judge Keel of the jury misconduct. On the morning of September 5, 1996 before the jury resumed punishment deliberation for the third day, Ms. Cook returned to the 232nd District Court and personally told Judge Keel of the jury misconduct which she witnessed and heard the day before. (1 R. 123). Judge Keel remained silent and concealed the report of jury misconduct. (1 R. 126). After two jury notes indicating dead-lock and a question concerning the effect of dead-lock on punishment, the jury reached a verdict and sentenced the Appellant to two (2) years confinement in the Texas Department of Corrections. (1 R. 98-99).

The subject of the improper jury communication was prior convictions, punishment and facts related to the case. (1

R. 123 & 126). The improper jury conduct transpired during the deliberation on punishment. After two jury notes indicating dead-lock during the punishment deliberations, it is obvious that the controlling issue before the jury was punishment, and that was the very substance of the jury misconduct. (*See Reed, supra*). The injury to the Appellant is presumed. *Robinson, supra*. It is not necessary to speculate on the probable effect upon the jury. *Reed, supra*. Because Judge Keel was placed on notice of the jury misconduct while the jury was still deliberating, the proper course of action was to inform the attorneys and question the jurors in order to determine their intent in making the improper statements and their ability to reach a fair decision. *Quinn and Robinson, supra*. Due to Judge Keel's error, the Court forever lost the one opportunity to determine the credibility and demeanor of the two jurors. The defense was never given the opportunity to investigate the misconduct and preserve the record by a motion for mistrial. (*See Quinn and Robinson, supra*). For reasons unknown, Judge

Keel chose not to use her one opportunity to remedy the situation and take the simple "corrective action" in order to remove the taint of misconduct, as authorized by the *Stephenson* Court. (*supra*). As learned in the *McCartney* case, the Court of Criminal Appeals allows the trial judge wide discretion in choosing to believe or reject all or part of the jurors testimony. (*supra*). It could not be any easier for a trial judge to remedy the situation. The trial court has complete discretion. Unfortunately for the Appellant and to his detriment, Judge Keel made a calculated decision to conceal the report of jury misconduct until after the verdict was rendered and the jury was discharged from service. The Court blatantly refused to adhere to the proper remedial procedure as set forth by the Court of Criminal Appeals in *Robinson, Quinn* and *Stephenson* (*supra*). Judge Keel chose to do nothing, and the taint of jury misconduct is now permanent. No attempt at 'hindsight harm analysis' will cure the taint. Because of the trial court's material error, we will never know the effect of the jury misconduct. Thus, the

Appellant was denied his right to a fair trial by the calculated error of Judge Keel. The only cure is a new trial. The Appellant timely filed his Motion for New Trial on October 2, 1996. (1 R. 122). The motion was supported by the affidavit of a person who was in a position to know the facts. (1 R. 123). The affidavit stated facts which were personally witnessed and heard, not mere suspicion. (1 R. 123). The witness is credible, reliable, and the official court reporter for the 263rd Criminal District Court of Harris County, Texas. (1 R. 123 & 126). Nevertheless, the court improperly denied Appellant's Motion for New Trial on November 8, 1996. (1 R. 125).

Because Judge Keel was placed on notice of the jury misconduct while the jury was still deliberating and then intentionally failed to take remedial action, the trial court lost the first and easiest opportunity to remedy the situation. The Appellant was thereby denied his right to a fair trial. Judge Keel committed her second error and lost her second and final opportunity to remedy the wrong by improperly denying the

Appellant's Motion for New Trial. Case law, common sense and reason clearly show that Judge Keel should have acted when she was first informed of the jury misconduct, i.e., prior to the verdict and discharge of the jury. (1 R. 123). One month later at the hearing on the Motion for New Trial, the only witness could no longer remember the physical descriptions of the two jurors who committed the misconduct. The Appellant is paying the price for the errors of Judge Keel.

In cases of jury misconduct, the appellate courts are instructed to defer to the trial court's determination concerning the credibility and demeanor of the suspected jurors. (*See Quinn, supra*). Unfortunately Judge Keel did nothing, which leaves this appellate court with nothing to defer. There is no argument by the State which can hide this fact. The proper remedy is a new trial or a reversal.

APPELLANT'S SECOND POINT OF ERROR

BASED UPON THE MISCONDUCT OF THE JURY AND THE MATERIAL JUDICIAL ERROR WHICH FOLLOWED, THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE U.S. CONSTITUTION AND THE TEXAS CONSTITUTION.

Appellant's second point of error is based upon and supported by the same facts, arguments and authorities as set forth in Appellant's first point of error. In the interest of judicial economy, Appellant will not restate the exact language of the first point of error.

It should be noted that in the Appellant's second point of error, the Appellant is again seeking the remedy of a new trial or reversal.